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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 245

C. O. HANSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Introduction	1
Judgment and Opinion Below	1
Jurisdiction	2
Questions Presented	3
Statute	8
Statement of the Case	9
Reasons for Allowing the Writ	27
Prayer	32

AUTHORITIES

CASES:

Achilli v. United States, 353 U.S. 373 10
Currier v. United States, 166 F. 2d 346 ..... 29, 30, 31
Davis, Poncet v. United States, 226 F. 2d 331 ..... 29, 30, 31
Drysbrough v. Com. of Int. Rev., 238 F. 2d 735 ..... 21, 22, 25
Goldman v. United States, 316 U.S. 129 28
Hanson v. United States, 208 F. 2d 914 ..... 10, 30
Jencks v. United States, 353 U.S. 657 ..... 3, 24, 28

STATUTES:

Internal Revenue Code 1939

Section 145(b) 8
Section 145(d) 9

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, C. O. HANSON, by his undersigned attorneys, respectfully prays for a writ of certiorari to The United States Court of Appeals for the Sixth Circuit in the above cause.

JUDGMENT AND OPINION BELOW

The judgment and sentence of the United States District Court for the Northern District of Ohio, East-

ern Division, is not reported but appears at pages 114-a and 115-a of the Record certified by the Clerk of the Court of Appeals below, and filed with this Court.

The Opinion of the United States Court of Appeals for the Sixth Circuit affirming said judgment was filed on April 26, 1958, and corrected on May 29, 1958. The Opinion, as corrected, is reported in 254 F.2d 359, and in the Appendix hereto. The original opinion and the order of correction appear in the certified Record.

The judgment of the United States Court of Appeals for the Sixth Circuit was filed on April 26, 1958, and appears in the addition to the Record, following page 740-a, certified by the Clerk of the Court below.

JURISDICTION

The Petition for Rehearing was denied on June 2, 1958, by the United States Court of Appeals for the Sixth Circuit and the said denial appears in Volume II of the Record, immediately preceding the certification of the Clerk of the Court below.

The time for the filing of this petition, in the absence of an extension, expires on July 2, 1958; however, Mr. Justice Harold H. Burton, on June 26th, 1958, extended the time for the filing of this Petition to and including August 1, 1958.

Jurisdiction is conferred upon the Supreme Court of the United States to review this cause by writ of certiorari by Section 1254-(1), (Title 28, USC) as enacted June 25, 1948; and the petition is timely within the purview of Rule 22-2 of the Revised Rules of this Court.

QUESTIONS PRESENTED

1. Was the Court below correct in holding that the doctrine of inspection of a document—in this case, the diary maintained by the Government witness—by defense counsel instead of by the Court "in camera" as pronounced by this Court in *Jencks* v. *United States*, 353 U.S. 657, decided subsequent to the trial in the case at bar, is inapplicable here because "Appellant's only objection was based on the failure to disclose the name of the party involved in the other tax matter."; or,

Is, as this Court stated in *Jencks* v. *United States*, at page 1015:

> "The burden is the Government's, not to be shifted to the trial judge, to decide * * * upon the possible disclosure of state secrets and other confidential information in the Government's possession."?

2. Where the Government on rebuttal adduced testimony and exhibits relating to the purported sale by dependent's corporation to the Ritter Lumber Company, on September 6, 1945, for $6,275.00, and the trial Court, over the objection of the defense, admitted such testimony and exhibits into evidence for a limited purpose by stating to the Jury:

> "The Court: Ladies and gentlemen of the jury, the evidence with respect to this item of the Ritter Lumber Company may be considered by you only as it may reflect or throw light on the motive or intent of the defendant here, and show for whatever bearing you may find it may have on the absence of any mistake."

and, where such shovel, purportedly sold, is not charged in the corporate or individual indictment, nor in the

Bills of Particulars, nor in the testimony adduced by your petitioner in his case-in-chief; and no proof was offered that the defendant received the proceeds of the purported sale; was the Court below correct in holding:

> "While it would *not* be otherwise admissable, it was properly introduced as evidence rebutting appellant's testimony."? (Italics supplied)

3. Did the trial Court err in admitting the evidence, set forth in Question No. 2 during the course of the trial pre-judge the defendant and in its statement to the jury at the time of such admission prejudice the defendant by assuming such evidence to be conclusive of the conclusion that the defendant received the proceeds of said sale when, in fact, no evidence whatsoever was tendered respecting the payment of said sum. The statement by the trial Court being:

> "Ladies and gentlemen of the jury, the evidence with respect to this item of the Ritter Lumber Company may be considered by you only as it may reflect or throw light on the motive or intent of the defendant here; and show for whatever bearing you may find it may have on the absence of any mistake."

just as did the Court below which mistakenly holds such evidence:

> "While it would *not* be otherwise admissible, it was properly introduced as evidence rebutting appellant's testimony."? (Italics supplied)

4. The Government on rebuttal adduced testimony and exhibits of another sale by defendant's corporation to the Ritter Lumber Company on January 4, 1946, the same in all respects as the factual situation

posed in Question No. 2, excepting that there was no corporate indictment or corporate bill of particulars for the year 1946; and the trial Court stated to the Jury:

> "This evidence, ladies and gentlement, is received with the limited purpose as it may throw light on the motive or intent of the defendant. It is not charged in the indictment as being an offense committed by him."

and the Court below held:

> "While it would *not* be otherwise admissible, it was properly introduced as evidence rebutting appellant's testimony." (Italics supplied)

Was this correct?

5. Here we raise the same question regarding Question No. 4, as that presented in Question No. 3 regarding Question No. 2, with the changed situation respecting the Indictment and the Bill of Particulars, and a slightly changed statement by the Court to the Jury; but the same holding by the Court below.

6. Did the Court below err in holding the defendant's point had no merit where the trial Court failed to decide Defendant's suggestion and motion made after verdict and before sentence, under circumstances where the motive by Defendant to reconvene the Jury for interrogation by and in the presence of Counsel for both parties to ascertain whether in fact the jurors, in arriving at their verdict, considered only the evidence that there were missing serial numbers of shovels, whereas the trial Court, in admitting such evidence, restricted it to the purpose of motive and intent; such information of the Jury's deliberations being sup-

plied to Defendant's Counsel by J. Donald Strawn; Juror number 2, who agreed to make a statement on that subject; however, when the time arose for a meeting for that purpose, he advised Counsel that he had decided not to make a statement; that he had talked to Judge McNamee, a long-time acquaintance, who had advised him not to make the statement; that he had talked to the trial Judge, who told him to use his own judgment as to what he should do; and he now had concluded not to make a statement?

7. Where the charge of fraud in an individual's income tax return rests upon the premise that monies he received from sales by a corporation of which he was President constituted income to him—the said sales not being recorded on the corporate books as sales, but included in the corporate inventory at sales price, so that the corporate income, in such cases, was not understated; and the individual omitted such monies from his tax return on the premise that he owed the corporation the money—can such charge of fraud be sustained on the theory of a constructive dividend; or

a. Is not a constructive dividend such only after a legal pronouncement that it is such; and, therefore, cannot be the basis for a charge of fraud; and

b. Is it not a fact that a constructive dividend requires as a basic condition the depleting of the corporate pocketbook to that extent; and

c. Is it not a fact that the substitution of one asset for another (Inventory in lieu of cash or accounts receivable) does not result in the depletion of the corporate net worth; and

Was it not error for the Court below to hold that, based on such constructive dividends:

> "There was substantial evidence to sustain the jury's verdict both as to appellant's intent, and as to his filing of false and fraudulent returns."?

8. Did the Court below err in holding that the trial Court correctly denied the Defendant's motion to dismiss the indictment involving the corporate return for the year 1945 on the grounds that it is vague and indefinite in that it charges in the singular the filing of *a false and fraudulent tax return*, whereas at least two returns, an income tax return and an excess profits tax return were due and filed, and the Bill of Particulars and the proof adduced were directed to more than one tax return?

9. Where the trial Court admitted in evidence a series of tabulations by the Government agents, Cannon and Susko, for the limited purpose of illustration only and not as evidence of the facts set forth therein; and then permitted blown-up copies of said exhibits to be placed upon easels in full view of the Jury; was it error to leave such blown-up copies not admitted into evidence at all, in full view of the Jury during the testimony of other witnesses and arguments by counsel over the objections of counsel; and did the Court below err in failing to find error in such procedure?

10. The Court below held that:

> "Whether appellant received the proceeds of the sales in the capacity of a trustee, intending to repay the corporation when it was safe to do so, and whether appellant understated the income of the corporation for 1945, and his own individual income for 1945 and 1946, were questions of fact."

nevertheless, notwithstanding the above statement in its opinion the Court below found no error in the trial Court's refusal to admit in evidence proof of the defendant's settlement with the corporation in 1954; that is, Defendant's Exhibit SS for Identification. Was it not error to fail to reverse the trial Court?

11. Did the Court below err in failing to hold that the trial Court erred in failing to grant the Defendant's Motion for Judgment of Acquittal made at the close of the Government's case-in-chief, repeated after the close of all the evidence, and again after verdict in Motion in Arrest of Judgment, on the grounds that not a scintilla of evidence was adduced establishing that the corporate and individual returns specified in the indictment were, in fact, false and fraudulent; or, that the Defendant did willfully and knowingly attempt to defeat and evade part of the taxes due and owing by the corporation or the Defendant?

12. Is not the Government bound by the Exhibits it offers in evidence, and where such exhibits show a course of conduct by the Defendant, inconsistent with guilt and consistent with innocence and mistake, should not the trial Court have taken the case from the Jury and granted the Defendant's motions of acquittal?

STATUTE

INTERNAL REVENUE CODE—1939

SECTION 145(b). FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully at-

tempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(d) PERSON DEFINED.—The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member, is under a duty to perform the act in respect of which the violation occurs.

STATEMENT OF THE CASE

On March 10, 1952; the federal grand jury sitting at Toledo, Ohio, returned two indictments against the Defendant charging the Defendant in one indictment with knowingly and willfully filing false and fraudulent income tax returns with intent to evade personal income taxes for the years 1945 and 1946 (Deft. App. 12a-14a); and, in the other indictment, charging him with knowingly and willfully filing *a false and fraudulent tax return* for the corporation—The Hanson Clutch and Machinery Company, of which the defendant was President—for the year 1945. (Deft. App. 11a-12a). It will be noted that no fraud was charged nor was there an indictment for the corporate return for the year 1946. The sufficiency of the corporate return indictment for the year 1945 is raised in Question No. 8.

The Defendant was tried on the indictment covering the individual returns for the years 1945 and 1946 (Deft. App. 12a-14a), in 1952, by a Jury before Judge

Kloeb in the Western Division sitting at Toledo, Ohio, and was found guilty. At that time, he was not tried on the charge involving the corporate return for the year 1945.

On appeal, the United States Court of Appeals for the Sixth Circuit, (208 F.2d 914) on December 21, 1953, reversed the judgment and remanded the case for a new trial. The Court reversed on the grounds inter-alia that the trial Court had erred in excluding evidence of the corporate treatment of a number of "M" invoices, as it:

> "deprived the appellant of the one explanation he had why the money claimed by the government to be his unreported income was not his money, but belonged to the company, and that he was, in a sense, only a trustee, or holder of the funds for the benefit of the company." (208 F.2d 914, 916).

Notwithstanding the foregoing statement in the reversal, the trial Court in the second trial refused to admit in evidence Deft. Exh. SS for Identification (Deft. App. pp. 128a-138a) the contract of settlement between the Defendant and his corporation, and the Defendant made a proffer of proof (Def's App. pp. 138-141a). This issue is raised in Question No. 10.

After remand, the individual and corporate cases were transferred to the Eastern Division of Ohio and Judge Weick granted the Defendant's motion to consolidate both cases for trial (Deft. App. p. 33a) but denied the motion to dismiss both indictments (Deft. App. pp. 31a, 33a). The motion to dismiss both indictments rested on three grounds (Deft. App. 31a); two of which, 2(b) and 2(c), have since been resolved by this Court and are no longer at issue. (*Achilli v. United States*, 353 U.S. 373; however, ground 2(a)

rested upon the theory that a constructive dividend (Deft. App. pp. 36a-40a) was a concept that required a judicial determination and, *a fortiori*, could not be the basis of a criminal charge. This issue is raised in Question No. 7. The attack on the indictment covering the corporate return was grounded on the fact that the indictment (Deft. App. pp. 31a, 32a) referred to *the tax return in the singular* without characterization, whereas, in fact, an income tax return and an excess profits tax return were filed; and the failure to state which return was false was fatal to the indictment. This issue is raised in Question No. 8.

The issue of fact relates to the treatment of a group of invoices designated "M" invoices, and whether in fact they were treated as they were for the purpose of concealing violation of the Controlled Materials Plan provided for by federal statute to conserve materials for Government use during the war period and to escape the penalties provided thereunder; and or whether the plan was conceived and carried through as a part of a plan to willfully and knowingly file false and fraudulent tax returns with the intent to evade taxes.

The plan had its origin by the issuance of the first "M" invoice on February 21, 1945.

The complete testimony has been included in the Defendant's Appendix and the reading of it fails to disclose a scintilla of evidence establishing fraud by the Defendant-Petitioner. As later herein appears, the Defendant directed that all "M" invoices be included in Inventory at sales price so that the corporation would pay its full income tax, and, substantially the entire sum was included in Inventory at sales price.

so much so, that the indictment respecting the corporate return for 1945 rests upon a few omissions from Inventory claimed to be a mistake; and for the year 1946, there was no indictment respecting the corporate return because every "M" invoice sale was inventoried at selling price. This issue of failure of proof is raised in Question No. 11. The Defendant freely admitted that he received all the proceeds of the "M" invoice sales, adduced during the Government's case-in-chief, such proceeds being turned over to him by the corporation's bookkeeper (Deft. App. p. 611a); in fact, very early in the trial, the defense was prepared to stipulate that all the proceeds of the aforesaid "M" invoices did reach the Defendant (Deft. App. pp. 257a; 258a). However, the Government chose to detail the methods of the monies reaching the Defendant (Deft. App. p. 258a) and presented its proof. Such proof included a great mass of invoices, including Gov. Exh. 12-f (Deft. App. 121a) which bears the legend in the Defendant's handwriting "List in Inventory", all of which we contend is binding upon the Government as producing proof of the Defendant's innocence. This issue is raised in Question No. 12.

The uncontradicted record shows that early in 1945 (Deft. App. p. 611a), the Defendant yielded to the supplications of his sales manager (Deft. App. p. 612a) and authorized the sale of goods without priority to meet a competitive situation (Deft. App. p. 611a) but that he showed

> "by all means keep it separate and out of the sales records for at least the time being until such time as we can get them back into sales where they belong." (Deft. App. p. 611a)

The first "M" invoice was No. 51, dated 2 21 45, in the amount of $60.00 (Deft. App. p. 612a, Gov. Exh. 14), and an analysis of Gov. Exh. 14 shows the issuance of:

Six "M" invoices between 2 21 45 and 3 8 45 aggregating $440.22, or an average of $18.37 per invoice; then one "M" invoice dated 3 9 45 in the amount of $1,566.82 for repair parts for a Model 33 Hanson machine (Deft. App. pp. 612a, 613a); followed by twenty-eight "M" invoices issued between the dates of 3 13 45 and 6 6 45 aggregating $1,034.55; or an average of $36.95 per invoice. (Gov. Exh. 14)

To this point the foregoing facts show the issuance of thirty-five "M" invoices between the dates of February 21, 1945, and June 6, 1945, aggregating $2,711.59; or an average of $77.47 per invoice, whereas total sales of the corporation for the year amounted to $1,926,324.80. (Gov. Exh. 90).

On June 6, 1945, there was sold to the Erie Basin Metal Products Company 2 Hanson cranes on invoice "M 90" for $14,620.00. The Defendant testified they were his property (Deft. App. p. 608a) and had been his property since 1940 (Deft. App. p. 609a) and the *Government* introduced as *Gov. Exh. No. 71* a photostat of the minutes of the 267th Regular Director's Meeting of the corporation of September 10th, 1940, whereat 2 pilot model 31 shovels were presented to the Defendant as his personal property (Deft. App. p. 123a), and we raise the question of the Government being bound by the testimony it adduces in Question No. 12.

Thereafter, between the dates of June 11, 1945, and July 9, 1945, "M" invoices, six in number, aggregat-

ing $135.06 were issued (Gov. Exh. 14). These average $22.51 per invoice.

Then, in point of time, "M" invoice 93 was issued to L. R. Kranz in the amount of $6,692.00 on July 10th, 1945, (Gov. Exh. 14, 15). This was an experimental crane (Deft. Exh. A, Deft. App. pp. 164a, 165a) sold on the instalment basis (Gov. Exh. 15).

Following the aforesaid Kranz sale, there was issued during the period July 11, 1945, and October 19, 1945, thirty-two "M" invoices aggregating $835.69 (Gov. Exh. 14), or, an average of $26.12 per invoice.

From October 19, 1945, ten weeks before the close of the year, larger amounts are involved. The record to October 19, 1945, compiled from Gov. Exh. 14, and the items appearing on Gov. Exh. 95, disclose:

The issuance of seventy-three (73) invoices aggregating $3,682.34, an average of $50.44 per invoice; plus the sale to Erie Basin of two shovels for $14,620.00 which the Defendant claims were his property, and that is confirmed by the Government in Gov. Exh. No. 71; and the instalment sale to Kranz of an experimental machine for $6,692.00.

The record shows that the bookkeeper kept the invoices not as yet recorded as sales in a manila envelope in the corporation safe (Deft. App. pp. 644a, 645a).

Between October 20, 1955, and December 29, 1955, there were eight large sales aggregating $43,465.00 (Gov. Exh. 95) that were included in the inventory at sales price at the end of 1945; and one sale of $1,529.65 on "M" invoice 142 that bears the Defendant's handwriting (Gov. Exh. 12-F, Deft. App. p. 121a) "List in inventory". The Defendant testified that the subject

matter of this invoice was in inventory (Deft. App. pp. 647a, 648a). The Defendant testified (Deft. App. pp. 615a, 616a) that as the year end approached he became concerned about the accumulation of "M" invoices and he instructed Mr. Reinman, the bookkeeper, to be sure Mr. Ditslear got those invoices and put them in inventory at sales price; and that the invoice M 142 (Gov. Exh. 12-F) was on top of the group and he thought he then wrote on the top invoice "List in inventory" (Gov. Exh. 12F). Mr. Ditslear died about 1950 (Deft. App. p. 616a). The Defendant also testified that he spoke directly to Mr. Ditslear and directed him to get the invoices from Mr. Reinman and put them in inventory at sales prices (Deft. App. p. 616a). This evidence is **uncontradicted.**

Therefore, for the year 1945, on the corporate accounting, $44,994.65 of "M" invoice sales were admittedly included in inventory at sales price, therefore, were fully tax paid, and $46,153.65 "M" invoice sales were not included in inventory. The $46,153.65 not included in inventory includes the Erie Basin sale of $14,620.00 which the Defendant claims was his own property (Deft. App. pp. 608a, 609a) and the Government's own evidence (Gov. Exh. 71) appears to bear out the Defendant. The Defendant explained the delay of five years in making this sale as occasioned by the fact that these machines could not be used on Government orders, because such orders were conditioned on inspection during the various stages of manufacture (Deft. App. p. 610a) and the Navy required light weight machines without cabs and without crowding mechanism (Deft. App. pp. 609a, 610a).

Of the remaining four uninventoried machines, three were sold on the instalment plan (Gov. Exh. 95-15,

11D, 86) that is, Kranz M-93, Herbert London M-139, Mat London M-140, and one was in transit to Texas over the year-end (Gov. Exh. 95, 1-L).

To summarize the facts for the year 1945 (Gov. Exh. 95),

9 machines were included in Inventory at sales price aggregating (Gov. Exh. 95, Deft. App. pp. 647a, 648a, 16a)	$44,994.65
2 machines were the property of the Defendant and not the corporation, aggregating	14,620.00
3 Machines were sold on the instalment plan and we suggest were filed separately aggregating	20,643.84
1 Machine was in transit on the Inventory date and therefore easily overlooked, amounting to	5,980.30
103 small invoices, averaging $47.66 per invoice and aggregating	4,909.51
Many of which were the Defendant's personal property (Deft. App. pp. 671a, 681a, 682a)	
Making a total at issue for the year 1945 insofar as the corporate records are concerned of	$91,148.30

In the final analysis, the question is: do the three instalment sales and the one in transit constitute fraud knowingly and willfully perpetrated by the Defendant, or are such items explained as the errors of the employees. The Government offered not one scintilla of evidence that these four items constituted fraud knowingly and willfully perpetrated.

The analysis contained in the preceding fifteen (15) paragraphs all are grounded on Government Exhibits and we raise in Questions No. 11 and 12, the failure of

proof by the Government and the binding effect on the Government of the evidence adduced by it.

There were no indictment respecting the 1946 corporate return, although "M" invoices were issued in that year (Gov. Exh. 96). All the sales of machines in 1946 not included in sales were inventoried at sales price, therefore, fully tax paid (Gov. Exh. 96, 1-O, 5-C, 5-P, 5-R). The 1946 Machines are four in number; the serial numbers of which are: #1930 (Gov. Exh. 1-O) shipped to Consolidated Power Co., on January 3, 1946, and billed in the amount of $5,228.80 appearing in the inventory (Gov. Exh. 94-a, line 9, Deft. App. 454a), at $5,228.80; #2031 (Gov. Exh. 5-C) shipped to the Harry Cornelius Company on November 6, 1946, and billed in the amount of $7,563.68 and appearing in the Inventory (Gov. Exh. 94-a, Deft. App. p. 457a) at $7,556.12; #2034 (Gov. Exh. 5-P) shipped to Barrasso's Cement Block Mfg. Plant on November 7, 1946, and billed in the amount of $6,806.00 and appearing in the Inventory (Gov. Exh. 94-a, line 4, Deft. App. p. 457a) at $6,806.00; #2040 (Gov. Exh. 5-R) shipped to Contractors' Equipment Company and billed in the amount of $6,448.85 and appearing in the Inventory (Gov. Exh. 94-a, lines 1 and 2, Deft. App. p. 460a) at $6,448.85; Boom (Gov. Exh. 3-a) shipped to L. R. Kranz and paid for on September 23, 1946, in the amount of $800.00 (Gov. Exh. 96) and appearing in the Inventory (Gov. Exh. 94a, Deft. App. p. 156a) at $800.00.

The only other items affecting the corporation for the year 1946 are seventy-nine small "M" invoices issued in 1946 (Gov. Exh. 14) aggregating $900.60, and averaging $11.40 per invoice. The Defendant testified (Deft. App. 671a, 682a) that such of these items as

were not his personal property were in inventory although he could not pick them out.

In support of the indictment relating to the individual tax returns of the Defendant for the years 1945 and 1946, the Government offered no proof of fraud. The Government added to the reported income of the individual all the receipts relating to the alleged corporate omissions from sales, without regard to the fact that the corporate net worth was not depleted. The compilation contained in Government Exhibits 95 and 96 is composed of the following factors:

	1945 Gov. Exh. 95	1946 Gov. Exh. 96	Total
Net addition to reported income	73,657.91	45,020.07	118,667.98
Items Inventoried at Selling Price by Corp.: M125, 128, 129, 131, 135, 142, 151, 153, 158, 185, 212, 213, 221	44,994.65	(26,831.71)	71,826.36
Balance	28,663.26	18,188.36	46,851.62
Defendant's Personal Property not income in these years — Erie Basin sale	14,620.00		14,620.00
Balance	14,043.26	18,188.36	32,231.62
Collections on 1944 Sale —L. R. Kranz	2,500.00		2,500.00
Balance	11,543.26	18,188.36	29,731.62

	1945 Gov. Exh. 95	1946 Gov. Exh. 96	Total
1945 Sale in Transit		5,980.30	5,980.30
Balance	11,543.26	12,208.06	23,751.32
Collections on 1945 Instalment Sales:			
L. R. Kranz (M 93)	2,942.28	3,749.72	6,692.00
H. London (M 139)	1,817.92	3,600.00	5,417.92
M. London (M 140)	1,182.92	1,980.00	3,162.92
Total Instalment Collections	5,943.12	9,329.72	15,272.84
Balance	5,600.14	2,878.34	8,478.48
Trivia and items that include considerable personal property of the Defendant:			
Small "M" invoices	4,909.51	900.60	5,810.11
Scrap Sales	345.75	1,343.21	1,688.96
Interest	44.88	334.53	379.41
Director's Fees	300.00	300.00	600.00
Total trivia and personal Property	5,600.14	2,878.34	8,478.48
Balance	none	none	none

The preceding paragraphs and the compilation contained therein are directed to the facts regarding Questions No. 11 and 12.

The Defendant, in 1949, sought to repay the corporation the proceeds of the sales that had been in his care for the company (Deft. App. p. 618a); but counsel, a Mr. Raymond, of Detroit, advised him not to do so while the income tax investigation was in progress (Deft. App. p. 618a). Later, in 1954, the Defendant, on advice of other counsel, did make a settlement with the corporation (Deft. App. p. 619a). The Defense offered the settlement agreement in evidence as De-

fendant's Exhibit 88 for Identification (Deft. App. pp. 128a-138a) and the Court reserved at that time its ruling (Deft. App. p. 649a). Subsequently, the Court refused to admit the settlement (Deft. App. p. 696a) into evidence and the Defense made a proffer of proof (Deft. App. p. 138a-141a). This goes to the issue raised in Question No. 10.

The Government's case on the 1945 corporate and individual returns and the 1946 individual return is summarized in Gov. Exh. 95 (Deft. App. 352a, 353a), 95a (Deft. App. 362a, 363a), 95b (Deft. App. 366a), 95c (Deft. App. 368a), 96 (Deft. App. 378a), 96a (Deft. App. 383a), 96b (Deft. App. 384a), 96c (Deft. App. 387a) through the witness Kenneth M. Cannon, a special agent in the Intelligence Division in the Internal Revenue Service (Deft. App. 330a). In each case, the exhibit was offered for the "limited purpose only of illustration" and not as evidence of the items set forth therein (Deft. App. 352a, 362a, 363a, 366a, 368a, 378a, 383a, 384a, 387a), the witness Cannon testifying with respect thereto.

From the testimony and the foregoing exhibits accepted for the limited purposes stated, the Government witness, Revenue Agent Gregory Susko (Deft. App. 468a) testified to the amount of tax the Defendant allegedly understated in the 1945 corporate return and the 1945 and 1946 individual returns; and this was accepted in evidence for the same limited purpose, that is, as illustration and not as evidence of the facts set forth therein, Gov. Exh. 95d (Deft. App. 472a), 95e (Deft. App. 475a), and 96d (Deft. App. 477a, 478a).

The proof adduced in the testimony of special Agent Cannon summarized in the illustrative exhibits presented through him, and the proof adduced in the testimony of Revenue Agent Susko summarized in the illustrative exhibits presented through him makes self-evident the failure of the Government to present a case warranting submission to the Jury.

For example: let us take the year 1946. Revenue Agent Susko testified that the amount available for dividends by the corporation *according to the return* was $47,469.35 (Deft. App. 477a). Of course, the return does not take into account the amounts the Government claims the income to be understated. One item not taken into account in that figure is $37,848.56 additional tax for 1945 (Gov. Exh. 95d). This sum which became—on the Government theory—a liability on March 15, 1946, as expounded by the Court below in *Drysbrough* v. *Com. of Int. Rev.* (238 F.2d 735, 6 C.C.A.) decided December 3, 1956, when deducted from the amount testified to as available, that is, $47,469.35 (Deft. App. 477a), reduces the amount theoretically available, at this point, to $9,620.79. However, the $47,469.35 starting point (Deft. App. 477a) now reduced to $9,620.79, is to be further reduced by $30,938.31 applied by this witness (Gov. Exh. 95d) as a constructive dividend for 1945 (Deft. App. 479a). The inescapable fact is that for the year 1946, since all machine sales not reflected in sales appeared in inventory at sales price, there was no depletion of the corporate pocketbook, and with no depletion there can be no constructive dividend. These facts relate to Question No. 7.

For the year 1945, we have this example: The witness Revenue Agent Susko, in determining the fraud

on the Defendant's 1945 individual tax return (Gov. Exh. 95a) can find only $30,938.31 to characterize as a constructive dividend (Deft. App. 476a), which amount is developed from (Gov. Exh. 95d). He then adds $42,419.60 (Gov. Exh. 95e, Deft. App. 476a) as to which he can find no constructive dividend, but adds it as "diverted receipts of The Hanson Clutch & Machinery Company (Deft. App. 476a). This item of $42,419.60 plus the alleged constructive dividend of $30,938.31 plus the directors fees of $300.00 (all appearing on Gov. Exh. 95e, and testified to as reported on page 476a) appear in detail and aggregate the $73,657.91 shown on Gov. Exh. 95. It includes $47,341.80 (Gov. Exh. 95) included in closing inventory at sales price and other minor adjustments. The sum of $42,419.60 is treated by the witness Susko (Gov. Exh. 95e) as income to the Defendant in his individual capacity as a taxpayer despite the fact that Gov. Exh. 95 and the testimony by Special Intelligence Agent Cannon shows the sum of $47,341.80 (which includes the $42,419.60) not to result in depletion of the corporate pocket-book. If there is no depletion of the corporate pocket-book, how can there be a diversion. The facts show a substitution of one asset (inventory at sale price) for another (proceeds of sale)—not "diverted receipts" (Deft. App. 476a). Again the requirements of the Court below, as pronounced in *Drysbrough v. Com.*, 238 F. 2d 735, have not been met. These facts relate to Question No. 7.

Government Exhibits 95, 95a, 95b, 95c, 95d, 95e, 96, 96a, 96b, 96c, 96d (Deft. App. 352a, 362a, 363a, 366a, 368a, 378a, 383a, 387a), were received in evidence over objection by the Defense while Special Intelligence Agent Cannon and Revenue Agent Susko were on the

witness stand, *limited for the purpose of illustration only, and not as evidence of the facts set forth therein* (Deft. App. 352a, 362a, 363a, 366a, 368a, 378a, 383a, 384a, 387a). Over objections by the Defense (Deft. App. 353a, 354a, 363a) enlargements of the foregoing exhibits ranging in size from five feet square (Deft. App. 354a, 378a) to two and one-half feet square (Deft. Exh. 363a, 366a, 368a, 383a, 384a, 387a, 472a, 475a, 478a) were placed upon easels in full view of the Jury and permitted to remain in such view during the testimony of other witnesses and the argument by Counsel to the Jury, despite objections by Counsel for the Defense (Deft. App. 469a, 491a, 634a, 734a, TR. 1143). These facts relate to Question No. 9.

Special Intelligence Agent Kenneth M. Cannon, called as a Government witness, testified that he first talked with the Defendant on October 25, 1948, in the Defendant's office, in the presence of Revenue Agent Susko (Deft. App. 332a).

The balance of the testimony respecting the agent's conversation with the Defendant appears on pages 332a and 333a, and the cross-examination on pages 396a-397a of Deft. Appendix. This interrogation and the following paragraph relate to the issue raised in Question No. 1, and clearly partake of impeachment purposes.

Following the luncheon recess, with the Jury excluded, the Government asked the Court not to permit the Defense to inspect the documents the witness agreed to produce (Deft. App. 400a, 407a). The position of the Defense is succinctly set forth on pages 402a-403a, and 406a-407a, concluding with the objection by the Defense. The purpose of the evidence, impeaching the witness, is stated by the Defense on page 413a of Deft.

App. and the interrogation continues through page 415a (Deft. App.). Since the foregoing record was made, this Court, on June 3, 1957, decided *Jencks* v. *U.S.*, (353 U.S. 657 77 S. Ct. 1007); holding inter-alia that in view of the fact that only the defense is adequately equipped to determine effective use of Government's documents for purpose of discrediting Government's witness and thereby furthering the accused's defense, the defense rather than the Court, must initially be entitled to see and determine what use may be made of them (Headnote No. 5, 77 S. Ct. 1007).

The Defendant left Tiffin, Ohio, for Miami, Florida, on January 27, 1946, and returned to Tiffin, Ohio, on March 9, 1946, (Deft. App. 617a). The Corporation *Tax Returns* for the year 1945 were signed by the Defendant on Monday, March 11, 1946. (Gov. Exh. 90, 90a, Deft. App. 617a, 618a, 592a, 464a, 465a). The 1945 Corporation Income Tax Return (Gov. Exh. 90) was prepared by Ernest C. Weiss and signed by him on February 26, 1946, (Deft. App. 464a) and the same is true respecting the corporation Excess Profits Tax Return (Gov. Exh. 90a), Mr. Weiss has an accounting firm in Toledo Ohio, (Deft. App. 464-a). This state of facts goes to Question No. 11.

The Government rested its case-in-chief on the afternoon of Monday, February 25, 1957, (Deft. App. 491a) shortly after Court reconvened at 2 p.m. that day (Deft. App. 490a). On resting, the Government did so without any reservation whatsoever (Deft. App. 491a). It did not seek a continuance or recess until another witness could be brought to Court. It rested its case-in-chief without any reservation or qualification whatsoever (Deft. App. 491a).

Notwithstanding its unqualified resting, the docket entries show the return on February 27, 1957, (Deft. App. 3a) of a subpoena served on Walker A. Pollard, a Government witness, on his arrival in Cleveland from Roanoke, Virginia, (Deft. App. 712a); the said Pollard took the stand shortly after the beginning of the afternoon session (Deft. App. 672a, 712a) as part of the Government's case on rebuttal. Over objection by the Defense that it was not proper rebuttal (Deft. App. 712a, 713a, 714a) the witness was permitted to testify to the purchase of two shovels, not included in the indictment, (Deft. App. 714a, 716a), not included in the Bill of Particulars (Deft. App. 14a-30a); and not the subject of Defense testimony. The one alleged sale (Gov. Exh. 117, 117a, 117b, 117c) appears to have been made by the corporation on September 6, 1945; (Deft. App. 715a); the other (Gov. Exh. 118) alleged sale appears to have been made by the corporation on January 4, 1946. For the year 1946, there was no corporate indictment; *and there was no evidence of the Defendant receiving the proceeds of sale of either machine.*

Nevertheless, the exhibits (Gov. Exh. 117, 117a, 117b, 117c, 118) and the testimony of Government witness Walker A. Pollard (Deft. App. 712a-721a) was admitted in evidence by the trial Court under the following rulings (Deft. App. 714a, 716a-717a):

> "The Court: Ladies and Gentlemen of the Jury, the evidence with respect to this item of the Ritter Lumber Company may be considered by you only as it may reflect or throw light on the motive or intent of the defendant here, and show for whatever bearing you may find it may have on the absence of any mistake."
>
> * * * *

"The Court: This evidence, ladies and gentlemen, is received with the limited purpose as it may throw light on the motive or intent of the defendant. It is not charged in the indictment as being an offense committed by him."

That the foregoing testimony and exhibits, admitted for the limited purposes of intent, as rebuttal, were extremely prejudicial to the Defendant is clearly apparent from the deliberations of the Jury.

The facts set forth in the preceding four paragraphs relate to the issues raised in Questions No. 2, 3, 4 and 5, and their importance to Question No. 6.

Following the discharge of the Jury, Counsel for the Defense interviewed the Jury in order to ascertain the basis for their verdict; and the shortness of their deliberations—less than two hours excluding lunch—in a case consuming nine trial days. Several jurors informed counsel that the only fact they considered was missing serial numbers of shovels. Excepting for one answer (Tr. 375) that made reference to missing serial numbers, the record is bare on this subject until the Ritter Lumber testimony on rebuttal; nor was that subject included in the queries submitted by a Juror or Jurors to the Court earlier in the trial. (Deft. App. 545a).

J. Donald Strawn, Juror number 2, agreed to make a statement on that subject; however, when the time arose for a meeting for that purpose, he advised Counsel that he had decided not to make a statement; that he had talked to Judge McNamee (a brother Judge to the trial Judge), a long-time acquaintance, who had advised him not to make the statement; that he had talked to the trial Judge who told him to use his own

judgment as to what he should do; and now has concluded not to make a statement.

The premise for the verdict of the Jury here is most important, in view of the limitation placed on the Ritter transaction by the Court.

The defense in its Motions after verdict and Memorandum of Law on Motion for a New Trial moved that the Court (Deft. Appx. 108a, 109a)

> "summon the Jury for interrogation by and in the presence of Counsel for both parties so that the miscarriage of justice may be corrected."

This motion the trial Court denied (Deft. App. 110a). The preceding four paragraphs go directly to Question No. 6.

REASONS FOR ALLOWING THE WRIT

At the outset, we believe it well to present to the Court why, in our opinion, this case should have so many questions that Counsel feel should be presented to this Court. Counsel has appeared on numerous occasions before this Court in the past two decades, and, never before, has it been necessary to present more than two or three questions. Here, however, the whole conduct of the trial was such that Counsel, in good conscience cannot ignore the many facets resulting from one error leading to another.

The trial Judge, his Honor Paul C. Weisk, is an estimable, patient and fair man; nevertheless, when this trial began he had been a Judge only ten months (Judge Weisk took office April 16, 1956, and this trial started February 18, 1957); and, we understand the case at bar was his first criminal trial of any duration or importance. With such limited judicial experience,

the numerous errors are perhaps understandable. Mr. Bailey, Chief Government Counsel (Mr. Ugast, we understand, was present purely to guide Mr. Bailey and participated in the conduct of the trial comparatively little) likewise received his baptism as Government Counsel in an important tax case in the case at bar.

We cannot in any other way explain the failure to realize the effect of submitting testimony without considering the binding effect on the one who adduces it.

Under the circumstances, the writ should be granted in order to correct a manifest injustice based upon the sanction by the Court of Appeals of a departure from the accepted and usual course of judicial proceedings by the trial Court, as to call for an exercise of this Court's power of supervision.

Another ground for the granting of this application for a Writ is the failure of the Court below to properly construe this Court's opinion in *Jencks* v. *United States*, 353 U.S. 657. The Court below appears to have entirely overlooked this Court's mandate that (p. 672):

> "The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession."

Of course, the *Jencks* case was decided after the trial in the case at bar and neither Counsel nor the trial Judge had the benefit of that decision; in fact, the parties argued and relied upon and distinguished the case of *Goldman* v. *United States*, 316 U.S. 129, which this Court distinguished in the *Jencks* case.

As a basis for its holding, quoted above, this Court stated that (pp. 668-669):

> "We hold, further that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.
>
> "The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant."

A third ground for the granting of this application for a Writ is a question of Federal Tax that should be but has not been decided by this Court. That question involves the situation where a *constructive dividend* is advanced as a basis for a fraud charge; and, its pertinence here is the indictment and conviction on the filing of the 1945 and 1946 *individual* income tax return.

There are two cases in the Court of Appeals that are considered as relating to this point—that is, the case of *Currier* v. *United States*, 466 F. 2d 346, decided by the First Circuit and *Poucet Davis* v. *United States*, 226 F. 2d 331, decided by the Sixth Circuit. Both of

these cases are distinguishable from the case at bar. In the *Currier* and *Davis* cases large sums of money were diverted from corporations controlled by the defendants; and the corporations had that much less assets than they would have had had there been no purloining of the corporation's assets. Here, there was no depletion of the corporate asests. Inventory at sales price was substituted for cash or accounts receivable and the corporation has as much assets after the event as before the event.

The Court below, in its reversal of the first trial, realized that the evidence of the "M" invoices was important and necessary, stating (*Hanson v. United States*, 208 F. 2d 914-916):

> "We are of the opinion that this [inventorying at sales price] was reversible error as it deprived appellant of the one explanation he had why the money claimed by the government to be his unreported income was not his money, but belonged to the company, and that he was, in a sense, only a trustee or holder of the funds for the benefit of the company."

Nevertheless, it failed to find error in the trial Court's refusal to admit in evidence Defendant's Exhibit 88 for Identification (Deft. App. p. 128a-138a) and the Defendant did make a proffer of proof (Deft. App. p. 138a-141a).

Addressing ourselves specifically to the series of errors during the trial, we find they fall into two groups: one growing out of the rebuttal testimony regarding the two Ritter sales and the other stemming from the tremendous volume of exhibits placed into evidence by the Government. For the latter purpose, the entire testimony is included in Defendant's Appendix.

As to the rebuttal evidence (purported Ritter sales), the Court below finds "it would not be otherwise admissible" but that it did properly rebut the Defendant's testimony. It will be noted that the proceeds of these purported sales were not shown to have been placed in the hands of the defendant—the Government was unable to prove payment at all. Therefore, while they were admitted for the limited purpose of proving intent and motive, how can they prove such a fact when there is no proof of payment. If we are to suppose—why not suppose that other machines were traded for these two items. Apparently, the Court below was misled by the trial Court's statement to the jury (Deft. App. p. 714a) which concludes:

> "and show for whatever bearing you may find it may have *on the absence of any mistake*. (Italics supplied)

Query: How can such evidence have any bearing on "mistake" when payment is not established?

This error (Question No. 2, 3, 4, 5 and 6) led to the Jury's failing to heed the Court's restriction on the use of the Exhibits and the Jury's search for missing machine numbers complained of in Question No. 6.

Obviously, the Court below was correct in holding that such evidence was otherwise *not* admissible; and, of course, without proof of disposition of the proceeds it was not proof of anything at all—certainly not intent or motive.

The exhibits of sales, invoices, bank checks and deposits of proceeds introduced by the Government as Government Exhibits run close to two hundred (200) in number. Of the nineteen machines involved, thirteen were, by the Government's own Exhibits included in Inventory at sales price and two were by the Gov-

ernment's own Exhibit (Erie Basin sale, Gov. Exh. 71) the personal property of the Defendant, with no proof of any profit to him in 1945 or 1946.

Does not such proof by the Government establish the innocence of the Defendant? It leaves only four (4) machines in question and it is not hard to reason that their omission was a mistake instead of fraud—three (3) of them were sold on the instalment plan and one (1) was in transit on the Inventory date.

Here, then, we have only proof of conduct the contrary to fraud with the instructions of the Defendant (Gov. Exh. 12-g) (Deft. App. 121a) "List in Inventory" and not a scintilla of proof pointing to fraud.

That is why we urge that here is a case that requires the exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all the proceedings of said Court of Appeals had in this cause, to the end that the proceedings and decision therein may be reviewed and determined by this Court; that the judgment of the Court of Appeals may be reversed; and that the petitioner be granted such other and further relief as may seem proper.

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